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No. 99-7000
A. 99A416

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1999

Supreme Court, U.S.
FILED
OFFICE OF THE CLERK

BOBBY LEE RAMDASS,

Petitioner,

v.

RONALD ANGELONE, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI AND APPLICATION FOR A STAY OF EXECUTION

Imminent Execution Scheduled
November 23, 1999

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Argument

As Ramdass' petition demonstrated, this case squarely presents two significant and recurring issues of national importance that should be resolved by this Court. In the Brief in Opposition ("BIO"), Respondent fails to offer a single valid reason why certiorari should not be granted. Instead, Respondent prematurely advances the reasons why he thinks Ramdass ought not to prevail on the merits if this Court grants review.

I. Ramdass' Claim Is Governed by This Court's Decision in *Simmons v. South Carolina*, and Not by an Extension of the Rule in That Case

The first question Ramdass has presented concerns the Court's decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994). The federal magistrate judge, the district court judge, and one of the three judges on the Fourth Circuit panel all read the *Simmons* decision itself as holding that a capital defendant is entitled to inform the jury of parole impossibility whenever the state seeks death based on future dangerousness and "the only available alternative sentence to death is life without the possibility of parole." *Id.* at 177 (O'Connor, J., concurring). Due process prohibits the state from "securing a death sentence on the ground, at least in part, of petitioner's future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment mean[s] life without parole." *Id.* at 161 (plurality opinion).

The Virginia Supreme Court and two of the Fourth Circuit judges read *Simmons* as applying only when the defendant is technically ineligible for parole at a specific point in time.[1]

[1] Neither Respondent nor the jurists who agree with him have pinpointed the exact moment when a court is supposed to determine the defendant's parole status. Is it the beginning of the sentencing trial, when the defendant may want to put on evidence about his parole status? Is it the end of the sentencing trial, when he may want an instruction defining "life imprisonment"? Judge Murnaghan believed that the correct date is when the court accepts the jury's recommendation and enters the death sentence. "Ramdass had a constitutional due process right to inform the jury of the wholly accurate information that by the time the sentence they were deliberating was officially entered by the judge, he would be ineligible under state law for parole." App. 20. Under Judge Murnaghan's timeline, Ramdass was *technically* ineligible for parole on the relevant date. His death sentence for the capital murder was officially entered on April 2, 1993, which was six weeks after the judge reduced to judgment the jury's verdict in the Domino's Pizza robbery trial.

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If the defendant is technically eligible for parole, the rule in *Simmons* does not apply — even if everyone but the jury knows for a certainty that there is no "possibility of parole."

The disagreement between these two groups of jurists is rooted in their employment of contrary standards for discerning the rule in *Simmons*. The jurists who agree with Ramdass used a functional mode of analysis and looked to the federal consequences of state law on parole eligibility. The jurists who agree with Respondent used a strictly technical mode of analysis and looked only to the state's own characterization of its own law. Clarification of the correct mode of analysis has import far beyond Ramdass' individual case because there are numerous ways in which defendants may be technically eligible for parole at a particular instant, and yet have no possibility of parole. Ramdass identified several of these ways at pp. 20-22 of his petition. Respondent replies not at all.

Respondent's only argument against certiorari — that Ramdass seeks an impermissible "extension" of *Simmons* — depends on the assumption that *Simmons* announced a technical rule rather than a functional rule. For purposes of certiorari, that argument puts the cart before the horse. The jurists who voted to grant habeas corpus relief all concluded that Ramdass was not seeking any "extension" of *Simmons*; rather, his case comes squarely within the core rule announced there that

the defendant has a due process right to inform the jury that the only alternative to death is a sentence of life without the possibility of parole.[2]

To the extent Respondent even acknowledges a tension between the modes of analysis, his arguments are misdirected and, in some respects, just plain wrong. First, this Court clearly employed a functional mode of analysis itself in *Simmons*. As Ramdass carefully documented in his petition at 26-29, South Carolina insisted (and Simmons effectively conceded) throughout the proceedings in this Court that Jonathan Simmons remained technically eligible for parole until the parole board made a formal declaration to the contrary.[3] The witness who testified at trial about Simmons' parole status made clear that he was operating on an assumption, rather than a formal declaration, of parole ineligibility. Notwithstanding the undisputed facts showing that Simmons was technically eligible for parole, Justice Blackmun wrote that Simmons presented "evidence conclusively establishing his parole ineligibility," *Simmons*, 512 U.S. at 158 (plurality opinion), and further noted that South Carolina "admits that an instruction informing the jury that petitioner is ineligible for parole is legally accurate," *id.* at 166 (plurality opinion). The only way

[2] Respondent suggests that under Ramdass' reading of *Simmons*, the jury could be informed only by a convoluted instruction like that set out in the BIO at 21. That is nonsense. *Simmons* requires the trial court to consider the totality of circumstances and to determine whether the defendant, if sentenced to life imprisonment, will ever have the opportunity to be considered for parole. Once the court concludes that the answer is no, it does not matter how the court arrived at that decision. The court will give the jury a simple, straightforward instruction like the following:

> You are instructed that if you sentence the defendant to life imprisonment, there is no possibility of parole before the end of his natural life. The defendant will never come up for parole consideration.

[3] Respondent asserts that Simmons was ineligible for parole at the time of his trial, but he does not include a single citation to the pleadings or the record in *Simmons* that supports this assertion or that refutes Ramdass' citations and authorities.

to harmonize Justice Blackmun's statements with the clear record is to acknowledge that he was referring to Simmons' pragmatic, functional ineligibility for parole, not his legalistic, technical ineligibility.[4] Any other reading of the plurality opinion would prompt the untenable conclusion that Justice Blackmun was ignorant of the record or that he misrepresented it.

Second, Respondent distinguishes on their facts the cases from this Court which show that (a) questions concerning the nature or duration of restraints on liberty require a functional mode of analysis, and (b) questions of federal law require courts to look to the consequences of state law rather than just to the state's characterization of that law. Ramdass, of course, did not present those cases for their facts; he identified them because they set out the analytical precedent that the Fourth Circuit ought to have followed when Respondent appealed the district court's grant of the writ. Respondent does not, and cannot, take issue with that precedent.

Finally, Respondent challenges any characterization of the entry of judgment on the Domino's Pizza robbery as a ministerial act. Admittedly, the judge in the Domino's Pizza trial had limited discretion to set aside the jury's verdict under Virginia Supreme Court Rule 3A:15(b) "for error committed during the trial or if the evidence is insufficient as a matter of law to sustain a conviction." App. 67. Neither of these conditions existed here, and Respondent does not pretend otherwise. More importantly, the Virginia Supreme Court necessarily concluded on remand that intervention under Rule 3A:15(b) was one of those "hypothetical future

[4] Respondent professes not to understand the term "functional ineligibility for parole," which he calls "nebulous" and "undefined." BIO at 12, 17, 20. A functional determination of parole ineligibility is simply a determination made by looking at how state law actually operates, rather than its technical terms. In Simmons' case, state law would operate so as to result in a subsequent formal declaration by the parole board that Simmons was ineligible for parole, and it would further operate so that Simmons would never have the opportunity to be considered for parole.

developments" that must be disregarded. *Simmons*, 512 U.S. at 166 (plurality opinion). If the state court had not reached this conclusion, it could not have counted the Pizza Hut verdict as a "strike" because that verdict was equally vulnerable to being set aside under Rule 3A:15(b).[5]

Respondent boldly states that "Ramdass does not argue that *Simmons* or any cases interpreting *Simmons* compel a decision in his favor." BIO at 18. Nothing could be further from the truth. During the sentencing phase of a capital murder trial, Virginia prosecutors may introduce virtually any evidence, adjudicated or unadjudicated, bearing on whether the defendant might be a danger to society if ever released. Realizing that capital murder defendants typically are not the most upstanding members of the community, this Court recognized in *Simmons* that the only way a defendant can rebut the evidence of future dangerousness is often to show that he will never *be* in society:

> In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he never will be released on parole.

Simmons, 512 U.S. at 164 (plurality opinion). Jonathan Simmons, who was technically eligible for parole at the time of his sentencing trial, but who clearly was never going to have the opportunity to be called before a parole board, was entitled by due process to tell his sentencing

[5] Respondent also includes a confusing and irrelevant discussion about whether "the judgment in the capital murder case" could have been set aside. BIO at 22. Although this is a point that the magistrate judge found important, it is unrelated to any argument in Ramdass' petition, and it is unrelated to any point raised by either the majority or dissent below. The Virginia Supreme Court held that the capital murder verdict counted as a "strike" even though judgment had not yet been entered, and neither party has taken issue with that determination.

jury of the virtual impossibility of that event ever occurring. That result, and the underlying logic, compels both certiorari and, ultimately, reversal.

II. Respondent Concedes a Split in the Circuits on the Meaning of *Ake*, and It Advances No Cogent Arguments As to Why Certiorari Should Be Not Be Granted.

In response to Ramdass' second question presented, referring to the Fourth Circuit's narrow and literal reading of *Ake v. Oklahoma*, 470 U.S. 68 (1985), Respondent offers four arguments, none of which has merit.

First, Respondent argues that Ramdass' *Ake* claim is defaulted. The Fourth Circuit, which is well known for its zealous enforcement of procedural defaults, expressly held that Ramdass fairly presented his *Ake* claim in the state habeas petition. App. 14. Respondent now argues that the Fourth Circuit was wrong, and that the claim was actually defaulted because it was not exhausted in state court.[6] Respondent is wrong. As the Fourth Circuit correctly stated, the standard is whether the petitioner "fairly presented" his federal claim to the state court. *Id.*; *see, Picard v. Connor*, 404 U.S. 270, 277 (1971). If a habeas petitioner has fairly presented the state court with the "substance" of his federal claim, he has satisfied this standard. *Vasquez v. Hillery*, 474 U.S. 254, 258 (1986).

Respondent does not dispute that Ramdass alleged in his state habeas petition that he "was denied the reasonable assistance of a mental health expert." (JA 229). Nor does respondent dispute that Ramdass specifically cited and summarized the holding in *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) and the Eighth and Fourteenth Amendments as federal bases

[6] Virginia law would not permit Ramdass to return to state court to exhaust this claim. Under the rule in *Teague v. Lane*, 489 U.S. 288, 297-98 (1989), the Court would have to treat this claim as defaulted if Ramdass did not fairly present it in the original state habeas petition.

for this allegation. (JA 229). Respondent does not dispute that Ramdass alleged facts in support of his claim that Dr. Samenow was pro-prosecution and refused to assist the defense by identifying any mitigating factors for the sentencing phase. (JA 229). Rather, respondent's complaint is that Ramdass presented this allegation and this law and these facts under a heading that referred solely to ineffective assistance of counsel.[7] This Court has never held that the heading for a claim, rather than the substance of the claim, controls the question of exhaustion. Indeed, the Court has suggested the opposite. *See, e.g., United States v. Minker*, 350 U.S. 179, 185 (1956) (holding that title of statute and heading of section cannot limit plain meaning of the text). The discrepancy between the heading and the substance of Ramdass' claim is no ground for default, and it is no ground for denying certiorari.

Second, Respondent argues that Ramdass is asking the Court to announce a new rule in violation of the antiretroactivity doctrine. In order to make this argument, however, Respondent must first create a straw man and then knock it down. Respondent builds that straw man by simply (and wrongly) recharacterizing Ramdass' claim. Ramdass alleges that Dr. Samenow, even at his best, was *incapable* of providing the assistance guaranteed by *Ake* because he harbored preconceived and radical views which rejected mental illness, rejected mitigation, and labeled psychiatry a tool for "excuses for crime." Respondent, however, recasts this as an allegation that Dr. Samenow did not render "effective assistance," as measured by the ndard in *Strickland v. Washington*, 466 U.S. 668 (1984). Respondent then predictably argues that such an

[7] Ramdass paired, under one heading, both his substantive allegation based on *Ake* and his closely related claim that trial counsel rendered ineffective assistance in failing to challenge Dr. Samenow's appointment.

"ineffectiveness" claim would be barred by the new rule doctrine. The Court should not be diverted by this non-issue, which does not advance nor even address the question of whether this Court should grant certiorari to resolve the important question actually presented in the petition for certiorari.[8]

Third, Respondent dismisses the split in the circuits as trivial. Respondent concedes, as he must, that in post-*Teague* habeas corpus cases, the Fourth and Fifth Circuits disagree with the Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits on the important question of whether an indigent criminal defendant's constitutional right to the assistance of a mental health expert in the sentencing phase of a capital trial is limited to cases where the state presents psychiatric evidence of future dangerousness.[9] Respondent glibly dismisses the conflict as groundless because in his view, the courts that disagree with the Fourth Circuit rendered decisions that conflict with the new rule doctrine. For purposes of certiorari, respondent's argument again puts the cart before the horse. The jurists who disagree with the Fourth Circuit all concluded that their decisions were squarely within the core rule of *Ake*.

Although respondent notes that some of the cases from other circuits concern the trial court's *actual* failure to appoint a mental health expert rather than its *constructive* failure to

[8] Respondent also attempts to rehabilitate Dr. Samenow in order to show that he was not "ineffective." This is the wrong forum for such efforts. Neither the district court nor the Fourth Circuit ever reached the fact-based issue of Dr. Samenow's competence, and the question presented in Ramdass' petition is whether the lower court was required to consider the merits of Ramdass' allegation even though the prosecution did not present psychiatric evidence of future dangerousness.

[9] Respondent quarrels with Ramdass' characterization of the Sixth Circuit's position, because the case there dealt with the defendant's right to a pathologist. *Ake*, of course, does not mention any right to a pathologist. If the Sixth Circuit reads *Ake* not being limited to its facts with respect to the kind expert, it surely reads *Ake* far more broadly than the Fourth Circuit.

appoint an expert — which is what the appointment of Dr. Samenow amounted to — this is irrelevant to the proper scope of *Ake*. Indeed, the fact that the trial court agreed that Ramdass was entitled to the assistance of a mental health expert makes Ramdass' case a stronger candidate for certiorari, as Ramdass explained in his petition.

The correct reading of *Ake* is an issue of national importance that respondent has attempted to deflect by introducing collateral local issues that have no ultimate bearing on the question presented to this Court. Respondent offers no compelling reason why this Court should not resolve this important issue.

Finally, in what is really a breach of civility unusual among Virginia lawyers, respondent's counsel virtually accuses Ramdass' counsel of attempting to somehow deceive this Court by lodging Dr. Samenow's report without advising the Court that it was not part of the record below. Although the status of the report has no bearing on the certworthiness of the questions presented, Ramdass feels constrained to address this *ad hominum* attack and to dispel any inference of wrongdoing.

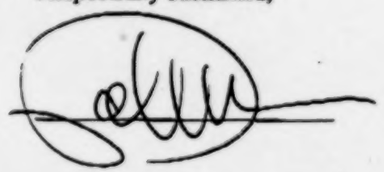
Both Ramdass *and* Respondent quoted from or paraphrased Dr. Samenow's report at length in their briefs to the court of appeals, just as they have done here, even though the report itself was not formally a part of the record. Counsel's decision to lodge the report with this Court was thus completely appropriate and above-board. The fact that the report was separately lodged, rather than contained in the Fourth Circuit joint appendix, surely put this Court on notice that the report was not a part of the record. Respondent's complaint, that Ramdass did not

explain to the Court *why* it was not in the record, is unfounded.[10] Ramdass lodged Dr. Samenow's report simply because it has been interwoven with the pleadings below and in this Court, and because he reasonably anticipated that a Member of the Court might want to examine it. For Respondent to refer extensively to Dr. Samenow's report, and then to insinuate that counsel for Ramdass attempted to mislead the Court by lodging that report — is inappropriate in this setting, is certainly untrue, and, frankly, is unseemly.

CONCLUSION

For the foregoing reasons, the Court should stay Ramdass' imminent execution and grant a writ of certiorari on each of the questions presented.

Respectfully submitted,



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[10] On appeal to the Fourth Circuit, counsel for Ramdass realized that, through oversight, the report itself was not actually a part of the record. Counsel moved to expand the record, and the Fourth Circuit deferred consideration of this motion pending oral argument. *See* Fourth Circuit Order dated April 27, 1999 (copy appended). The Fourth Circuit ultimately denied this motion long after oral argument, and only five days before it issued its opinion on August 3. *See* Resp. App. 7-8. The court of appeals gave no reason for this action. Since the Fourth Circuit never reached the merits of the *Ake* issue, however, that court most likely concluded that the report was superfluous.

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Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

CERTIFICATE OF SERVICE OF REPLY BRIEF

I hereby certify that I am a member of the Bar of this Court and that on November 19, 1999, pursuant to Rule 29.3 of the Rules of United States Supreme Court, I caused a copy of the Reply Brief to be served by facsimile and regular mail on Katherine P. Baldwin, Esq., Assistant Attorney General, 900 E. Main Street, Richmond, VA 23219.

F. Nash Bilisoly

FILED: April 27, 1999

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 98-30(L)
(CA-96-831-2)

BOBBY LEE RAMDASS,

Petitioner - Appellee,

versus

RONALD J. ANGELONE, Director, Virginia Department of Corrections,

Respondent - Appellant.

ORDER

Appellee/cross-appellant has filed a motion to supplement the record pursuant to Rule 10(e) of the Federal Rules Of Appellate Procedure and this Court's Local Rule 10(e). Appellant/cross-appellee filed a response in opposition to the motion, and appellee/cross-appellant filed a reply in support of the motion.

The Court defers action on the motion to supplement the record until oral argument of these cross-appeals.

For the Court

/s/ Patricia S. Connor
Clerk